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No.

IN THE SUPREME COURT
OF THE UNITED STATES

THE JUSTICES OF THE
BOSTON MUNICIPAL COURT,
Petitioners,

V.

MICHAEL LYDON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. Whether a federal court may grant habeas corpus relief to an individual free on personal recognizance prior to a trial *de novo*?

II. Whether a federal court may sit as a court of appellate review to determine the sufficiency of evidence adduced at a bench trial where the state provides for a trial *de novo* as the sole remedy for anyone dissatisfied with the result of a bench trial which a defendant has chosen voluntarily in the first instance?

III. Whether *Burks* v. *United States*, 437 U.S. 1 (1978), has application to the trial *de novo* system?

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PETITION FOR WRIT OF CERTIORARI
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OF APPEALS FOR THE FIRST CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, Lydon v. Justices of the Boston Municipal Court, No. 82-1376 is not yet reported. (App. A). The opinion of the district court is reported at 536 F.Supp. 647 (D. Mass. 1982). (App. B). The decision of the Supreme Judicial Court, Lydon v. Commonwealth, is reported at Mass. Adv. Sh. (1980) 1915, 409 N.E.2d 745 (1980). (App. C).

JURISDICTION

The decision below issued on December 30, 1982. A motion to stay issuance of the mandate pending the filing of a petition for writ of certiorari was allowed until March 21, 1983. The jurisdiction of this court is claimed under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Fifth Amendment

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. ..."

STATEMENT OF THE CASE

Michael Lydon was charged with possession of burglarious implements and breaking and entering a motor vehicle with the intent to commit a misdemeanor. Although he had a right to a jury trial in the first instance, he elected a

bench trial, preserving his right to a subsequent jury trial if dissatisfied with the results of the bench trial.[1/]

At the close of evidence at the bench trial, counsel for Lydon argued that the Commonwealth had failed to introduce sufficient evidence on an element of the crime. A guilty verdict was entered. Lydon then claimed his right to trial by a jury of six. Prior to the jury trial, he moved to dismiss the complaint, alleging that the evidence at the bench trial was insufficient to support conviction. The motion was denied.

Lydon then sought extraordinary relief pursuant to Mass. Gen. Laws c. 211, §3. The jury trial was stayed and two questions were reported to the Full

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1/ Mass. Gen. Laws c. 218, §§26, 26A.

Bench.[2/] The majority of the Supreme Judicial Court found the double jeopardy claim to be without merit and further found that a jury trial judge would have no occasion to consider the sufficiency of the evidence at the bench trial. Lydon v. Commonwealth, 409 N.E.2d 745 (1980).

Lydon filed a petition for writ of

2/ 1. Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, requested by him without waiving his rights, when the evidence at bench trial was insufficient to warrant a conviction?

2. Assuming that a jury trial in such an instance would be denial of defendant's right not to be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level, assuming, of course, that the judge at the bench trial had denied an appropriate request for a ruling that the evidence at the bench trial was sufficient."

certiorari which was denied. 449 U.S. 1065 (1980).

A petition for writ of habeas corpus was then filed in the District Court for the District of Massachusetts. The respondents below moved to dismiss on the grounds that the Court lacked jurisdiction and that the petition failed to state a claim upon which relief could be granted. The court denied respondents' motion to dismiss and ordered that the petition be granted, that the petitioner be released from personal recognizance and that he not be retried. (App. B). The order of the district court was stayed pending appeal.

The Court of Appeals affirmed the judgment and granted the following relief:

> "The appropriate relief is simply issuance of the writ providing Lydon his freedom from being

> required to answer any summons to a second trial. We have no reason to believe the Commonwealth will seek to retry him unless the decision is reversed. Lydon v. The Justices of the Boston Municipal Court, Slip Opinion at 25 (No. 82-1376). (App. A).

REASONS FOR GRANTING THE WRIT

I. The decision below which is neither constitutionally nor logically compelled, conflicts with the tenor of decisions of this and other lower federal courts concerning the jurisdiction of federal courts in habeas corpus actions and the scope of relief which may be granted.

II. The decision below constitutes an unwarranted and constitutionally unnecessary extension of Burks v. United States, 437 U.S. 1 (1978).

III. The decision below creates an entirely new class of cases cognizable on federal habeas corpus review.

ARGUMENT

I. THE COURT BELOW HAS ERRED IN GRANTING PRE-TRIAL HABEAS CORPUS RELIEF TO A DEFENDANT IN A STATE CRIMINAL PROCEEDING.

INTRODUCTION

The Massachusetts Trial De Novo System

Under the Court Reorganization Act of 1978, a defendant, charged with a crime over which the Boston Municipal Court and the district courts of the Commonwealth have original jurisdiction, has a right to be tried by a jury in the first instance or he may elect an initial bench trial.[3/] If the defendant elects a bench trial, he must file a written waiver of the jury trial.[4/]

3/ Mass. Gen. Laws c. 218, §26A.

4/ Id. The waiver will be received only if a defendant is represented by counsel or has filed a written waiver of counsel.

If a bench trial is chosen, and a defendant is dissatisfied with the outcome, his sole remedy is a trial de novo, before either a judge or jury at his election with appellate review after conviction based upon the record of the de novo trial.[5/] With the claim of the de novo trial, the judgment at the bench trial is "wiped out." Mann v. Commonwealth, 359 Mass. 661 (1971). If a jury trial is chosen in the first instance, appellate review is available following conviction.[6/]

The two-tier system is not unique to Massachusetts, but, as is acknowledged by the First Circuit, has been enacted in similar form in several of the states. Therefore, the decision of the

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5/ Mass. Gen. Laws c. 218, §§26 and 27A; c. 278, §18.

6/ Mass. Gen. Laws c. 218, §27(g).

Court of Appeals permitting review, in a federal court, of the sufficiency of the evidence adduced at a bench trial, prior to a de novo trial which a defendant has chosen and if it determines the evidence to be insufficient, barring the de novo trial on double jeopardy grounds affects not only Massachusetts.

A. Respondent Is Not "In Custody" For Habeas Corpus Purposes.

Lydon alleged federal jurisdiction pursuant to 28 U.S.C. §2241 and §2254.

Section 2254 pertains only to a state prisoner in custody pursuant to a judgment of conviction of a state court. Lydon is not in custody pursuant to a "judgment of conviction" of a state court. That judgement was "wiped out" with his claim of a trial de novo. Mann v. Commonwealth, 359 Mass. 661, 667 (1971). See also Costarelli v.

Massachusetts, 421 U.S. 193, 194 (1978). The only restraint on Lydon is a personal recognizance pending his de novo trial. It is submitted that personal recognizance does not satisfy the custody requirement of §2241 and that even were the court possessed of jurisdiction, it should not have exercised it.

The court below determined that the custody requirement was met under Hensley v. Municipal Court, 411 U.S. 345 (1973). Hensley is distinguishable. In Hensley this court held that a person who was convicted and sentenced at a state court trial, but who was enlarged on his own recognizance pending execution of sentence was in sufficient custody to confer jurisdiction on the federal court.

The significant different here is that Lydon is not on recognizance

following either conviction or sentence; unlike Hensley, any future incarceration is a "speculative possibility that depends on a number of contingences..." Hensley at 352. Moreover, the finding of custody here does interfere with a "significant interest" of the Commonwealth - its ability to administer the two-tier system in an orderly fashion. To permit federal intervention is to create yet a third and fourth federal tier and cause substantial delay in the trial of relatively minor offenses.

Personal recognizance under these circumstances does not constitute a "severe" restraint on an individual's liberty - it is a restraint no greater than that imposed on a witness under subpoena. To hold that such an individual is "in custody" is to truly

open the doors of the federal court to all persons prior to trial. It is submitted that the court below has improperly extended Hensley from a post-trial setting to a pre-trial situation.

Moreover, it is only 28 U.S.C. §2254(e), not §2241, which specifically provides for review of the sufficiency of the evidence, once the jurisdictional prerequisite of "custody pursuant to the judgment of a state court" is met. It is therefore submitted that the court lacked jurisdiction to rule on the claim of insufficient evidence.

Assuming arguendo that the jurisdictional requirement has been met, it is submitted that the court below has violated principles of comity and federalism in granting pre-trial relief.

First, the threshold issue decided by the federal court was whether

sufficient evidence was introduced at the bench trial to support conviction - no state court has ever ruled on this claim. Relief from a conviction in which such an error or any other error of law has allegedly occurred is had in Massachusetts by a trial de novo. Therefore, Lydon has not sufficiently exhausted his state court remedies.

Second, the pre-trial relief afforded, effectively aborting the de novo trial, runs contrary to decisions of this and lower federal courts. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973) is the leading case on the propriety of a pre-trial grant of relief. In Braden the court granted relief to a petitioner seeking to require the state to grant him a prompt trial. The court emphasized that the relief requested

would not "abort a state proceeding or ... disrupt the orderly functioning of the state judicial processes." Id. at 491. The result reached by the First Circuit has done just that, contrary to the admonition in Braden,

> "[w]e emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court." Id.

Here, the double jeopardy defense is indeed premature because prior to a ruling by the federal district court on the sufficiency of evidence there exists no colorable double jeopardy claim. If the defendant challenges the evidentiary sufficiency of the prosecution's case he need but go forward with the trial de novo and put the prosecution to the test. The federal court should abstain

where the issue may be resolved by trial on the merits. See gen. Atkins v. People of State of Michigan, 644 F.2d 543 (6th Cir. 1981); Neville v. Cavanaugh, 611 F.2d 673 (7th Cir. 1981). Moreover, no extraordinary circumstances justifying pre-trial relief have been presented. See Braden at 508 (Rehnquist, J. dissenting); Moore v. DeYoung, 515 F.2d 437 (3rd Cir. 1975).7/

Therefore, it is submitted that even if the court had jurisdiction, the grant of relief was premature and violated principles of comity and federalism.

7/ Although, a number of lower federal courts have indicated that a double jeopardy claim does constitute an extraordinary circumstance justifying pre-trial habeas consideration, the instant case presents nothing more than a denial of a motion for a directed verdict of acquittal.

B. The Court's Assumption Of Jurisdiction To Review A Sufficiency Of The Evidence Claim Prior To A De Novo Trial Is In Conflict With Decisions Of Other Circuit Courts of Appeal.

The Fourth, Fifth and Ninth Circuits, in analogous circumstances, have denied federal defendants appellate review of "evidence insufficiency" claims prior to federal retrial. United States v. Ellis, 646 F.2d 132 (4th Cir. 1981); United States v. Rey, 641 F.2d 222 (5th Cir.), cert. denied, 102 S.Ct. 318 (1981); United States v. Becton, 632 F.2d 1294 (5th Cir. 1980), cert. denied, 102 S.Ct. 141 (1981); United States v. Carnes, 618 F.2d 68 (9th Cir.), cert. denied, 100 S.Ct. 3028 (1980). But see United States v. McQuilkin, 673 F.2d 681 (3rd Cir. 1982).

In each case the circuit courts have refused to permit interlocutory review

of a sufficiency of the evidence claim, even though, as here, an attempt was made to characterize the issue as one of double jeopardy. In each case the courts viewed the decision in Abney v. United States, 431 U.S. 651 (1977), as limited to colorable and perfected claims of double jeopardy.

Moreover, Abney concerned the construction of the term "final decision" under 28 U.S.C. §1291 and held that an interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds was permitted. The decision was concerned solely with federal appellate jurisdiction. It did not involve a jurisdictional issue in which the "potential conflict between courts of two different governments," (Radio Station WOW v. Johnson, 326 U.S. 120,

124 (1945)), necessarily implicates those principles of comity and federalism which dictate restraint from precipitous federal involvement in state criminal proceedings. It is submitted that Abney, addressing the final judgment rule within a unitary system, has no affect on the jurisdictional requirements of §2254 or §2241(c)(3) concerning state prisoners.

A contrary decision, however, was reached in Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981). The Sixth Circuit found jurisdiction to permit issuance of the writ stating,

> "when a state reviewing court specifically finds the evidence sufficient to support a conviction but reverses on other grounds and orders a new trial, the defendant may seek to prevent retrial on double jeopardy grounds by bringing a federal habeas corpus proceeding after state

remedies have been exhausted." Delk v. Atkinson, supra at 93.

In the instant case, however, no state reviewing court has reviewed the sufficiency of the evidence, nor is the state constitutionally required to provide such review. Griffin v. Illinois, 351 U.S. 12, 18 (1956). Therefore, the double jeopardy claim is not ripe for review in a federal habeas corpus case. Moreover, the instant case did not present to the federal court a double jeopardy question, the claim is simply one of a denial of a motion for directed verdict. The federal court here first assumed jurisdiction to review the sufficiency of evidence at a bench trial and only after that determination was made did any colorable claim of double jeopardy arise.

C. The Relief Granted Conflicts With The Fifth And Seventh Circuits' View of The Proper Scope Of Habeas Relief.

The relief granted by the court below, release from personal recogniance and an expressed expectation that the Commonwealth would not attempt to provide Lydon with the trial de novo he claimed, conflicts with the Fifth and Seventh Circuits as to the proper scope of relief to be accorded a habeas application.

As the Fifth Circuit has noted, the practical effect of such an order is to enjoin the Commonwealth from trying the defendant.[8/] Kolski v. Walton, 544 F.2d 762, 763-764, n.2 (5th Cir. 1977).

In both Kolski and Stevens v. Circuit Court of Milwaukee County, 675

8/ The court attempted to avoid the Justices' contention that the District Court had improperly enjoined the trial de novo. Lydon, Slip Opinion at 25.

F.2d 946 (7th Cir.), the circuit courts recognized that the principles of judicial restraint premised upon the doctrines of comity and federalism as enunciated in Younger v. Harris, 401 U.S. 37 (1971), require that a federal court not interfere in a pending state criminal proceeding whether the claim for relief be by habeas corpus or by either injunction or declaratory relief, in the absence of extraordinary circumstances. In neither the district nor appellate court did Lydon meet the burden of demonstrating extraordinary circumstances, nor did the courts require him to do so.

It is submitted therefore that the principles of federalism and comity underlying Younger are applicable to this habeas proceeding and the petitioner has failed to satisfy the

abstension hurdles established by that case.

II. THERE IS NO CONSTITUTIONAL BASIS FOR EXTENDING BURKS V. UNITED STATES, 437 U.S. 1 (1978) TO THE TRIAL DE NOVO SYSTEM.

A. Burks Is Limited In Its Application.

The precise holding in Burks v. United States, 437 U.S. 1 (1978) is that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." Burks at 18. In each case following Burks, this court has reiterated that the Burks exception to permitting retrial after reversal is triggered by an appellate decision that the evidence at trial was insufficient. Bullington v. Missouri, 451 U.S. 430, 442, 443 (1981); Tibbs v. Florida, ___ U.S. ___, 102 S.Ct. 2211 (1982).

It seems quite clear from decisions of this court that Burks has application

only where a court having jurisdiction to review the sufficiency of the evidence, finds that as a matter of law the evidence was insufficient to support a conviction. Under these circumstances, retrial is forbidden. See Hudson v. Louisiana, 450 U.S. 40, 45, n.5 (1981). Contrary, to the decision of the First Circuit, the Fourth, Fifth, Sixth and Ninth Circuits[9/] have deemed a prior decision by an appellate court as critical to the application of Burks.

It is submitted that the First Circuit's finding that review of a sufficiency of evidence claim, in the first instance, by a federal district court by way of a habeas corpus petition

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9/ United States v. Ellis, 646 F.2d 132 (4th Cir. 1981); United States v. Becton, 632 F.2d 1294 (5th Cir. 1980); Delk v. Atkinson, supra; United States v. Carnes, 618 F.2d 68 (9th Cir. 1980).

satisfies the Burks requirement is unsupported.

Reliance on Jackson v. Virginia, 443 U.S. 307 (1979) is misplaced. Jackson sought habeas corpus relief pursuant to 28 U.S.C. §2254, after a state Supreme Court had denied on the merits a petition for writ of error on the ground that the evidence was insufficient to support conviction. This court found that Congress had specifically provided for review of the issue in a federal court under §2254. Jackson did not deal with the scope of jurisdiction under §2241. The rationale for the duty of the federal court to provide such review is stated as:

> "The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur - reflecting as it does the belief that the 'finality' of a deprivation of liberty through the invocation

> of the criminal sanction is simply not to be achieved at the expense of a constitutional right - is not one that can be so lightly adjured." Jackson at 323.

There is no finality, in general, attendant to a determination of guilt at a bench trial and in this specific case the judgment was "wiped out" when Lydon voluntarily chose a de novo trial. Moreover, Lydon, unlike Jackson, has not satisfied the settled procedural prerequisites for his claim under §2254. Therefore it is submitted, he is not entitled to habeas corpus relief under Jackson.

Furthermore, it is basic that a federal district court does not sit as a court of appellate review over state criminal trials. This court in Jackson did not extend habeas corpus jurisdiction, it simply announced a

standard of review applicable once jurisdictional prerequisites under §2254 had been met. Jackson does not provide a basis for extending Burks to the trial de novo system.

B. The Double Jeopardy Clause Is Not Offended By Operation Of The Trial De Novo System.

The Double Jeopardy Clause is designed to protect against,

> "... permitting the sovereign freely to subject the citizen to a second trial for the second offense would arm government with a potential instrument of oppression." United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977).

The Massachusetts trial de novo system, as has been noted, is entirely voluntary. The prosecution does not have any authority to force a defendant to undergo two trials. The right to a jury trial is not conditioned on first undergoing a bench trial. The system

does not permit retrial after acquittal. The defendant may elect to receive an initial jury trial with appellate review or he may choose a bench trial with the option of a second chance to be acquitted on the facts. He is deemed to have waived any review of the bench trial except a de novo trial.[10/] This system does not constitute the type of governmental oppression the double jeopardy clause is designed to protect against.

The decision below needlessly affects the ability of the state to

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10/ The First Circuit viewed this "waiver" to be subject to the waiver standard of Johnson v. Zerbst, 304 U.S. 458, 464 (1938), i.e. "an intentional relinquishment of a known right or privilege." However, that standard applies only to waiver of fundamental constitutional rights. No such right is involved herein. The defendant waives only his right to appellate review - to which he has no constitutional right. Griffin v. Illinois, 351 U.S. 12 (1956).

experiment in the area of criminal trial procedure and to provide practical advantages to defendants, without any indication that the trial de novo system operates in a manner which is arbitrary, capricious or unreasonable. See gen. New York State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1972) (Brandeis, J.).

The decision not only constitutes an injustice to the Commonwealth, but places an unnecessary burden upon the federal district courts by requiring them to sit as a court of appellate review in the first instance in every case in which insufficiency of evidence is alleged by a defendant convicted at a bench trial in the Commonwealth of Massachusetts. Such a result disrupts the orderly administration of justice in the already overburdened federal system and causes significant delay in the two-tier system where those convicted in

the bench trial may now avail themselves of yet a third federally created tier. Such a procedure offends all notions of comity and federalism and creates an entirely new class of cases susceptible to habeas review.[11/]

CONCLUSION

For the reasons stated above the writ of certiorari should issue to review the decision of Court of Appeals for the First Circuit.

Respectfully submitted,

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11/ Now pending in the District Court are the following: Tinder v. Sister Rose Paula, No. 80-2127-T; Montanez v. Justices of the Boston Municipal Court, No. 82-1965-N; Murchinson v. Justices of the Boston Municipal Court, No. 83-444-S.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1376

MICHAEL LYDON,
Plaintiff, Appellee,

V.

JUSTICES OF THE BOSTON
MUNICIPAL COURT
Defendants, Appellants.

APPEAL FROM THE UNITED STATES
DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. W. Arthur Garrity, Jr.,
U.S. District Judge]

[536 F.Supp. 647 D. Mass. (1982)]

Before

Davis*, Campbell and Breyer,

Circuit Judges.

December 30, 1982

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*Of the Federal Circuit, sitting by designation.

BREYER, Circuit Judge. The habeas corpus petitioner in this case was convicted of a state crime by a Massachusetts judge under the Massachusetts "two-tier" criminal trial procedure. As in his right under that procedure, the petitioner then chose to have a completely new trial by jury. He argued, however, to the new trial court, to the Massachusetts Supreme Judicial Court, and then to the federal district court, that he must be released, rather than undergo a new trial, because his bench trial conviction rested on insufficient evidence and any new trial would therefore place him in double jeopardy. In violation of the Fifth Amendment to the United States Constitution.

The federal district court reviewed the trial record and found that the evidence at the bench trial was

constitutionally insufficient for conviction. The court further found that the state had not obtained defendant's informed consent to run a risk of double jeopardy harm, though it was not (nor in the future would it be) difficult for the state to seek such informed consent from criminal defendants. It held that a second trial was therefore barred by the Double Jeopardy Clause. Lydon v. Justices of Boston Municipal Court, 536 F.Supp. 647 (D. Mass. 1982). We agree with the district court and affirm its decision.

I

The Massachusetts two-tier system, like others in nearly half the states, allows a defendant to choose either the standard route of a jury trial with appellate review, or the two-tier

route. See Comment, Double Jeopardy Problems Presented by Two-Tier Systems, 69 Geo. L.J. 1525, 1527 (1981). If he chooses the latter alternative, he first receives a bench trial. If he is convicted, he then has an absolute right to choose a second trial to take place de novo, either before a jury, or (if the defendant waives the jury) before another judge. Mass. Gen. Laws ch. 218, §§ 26, 26A, 27A. The original system did not permit the initial choice--all defendants went through both tiers of the system. See Ludwig v. Massachusetts, 427 U.S. 618 (1976). The present system is the product of the Court Reorganization Act, Chapter 478 of the Act of 1978, see Note, Double Jeopardy and the De Novo System, 16 New England L. Rev. 303, 308-09 (1981), following recommendations made by the

Governor's Select Committee on Judicial Needs (the "Cox Committee") in 1976.

Prior to 1978, it would have been difficult to see how, from a constitutional perspective, this system could work to a defendant's disadvantage. For one thing, he is free to disregard the system by choosing an initial trial by jury. For another, if he chooses the two-tier alternative, he is entitled to a totally new trial on request. It is as if the state automatically accepts any complaint a defendant may have about his first trial; a new trial is always granted. See Ludwig v. Massachusetts, 427 U.S. at 651. At the same time, the system saves both the state and the defendant time and expense, because many defendants, presumably after seeing the evidence against them, do not seek the automatic

new trial to which they have a right. Thus, the Massachusetts Supreme Judicial Court wrote that only about 9 percent of the criminal defendants in Boston chose a jury trial in the first instance, and "thousands of complaints were finally disposed of by convictions at bench trials because the affected defendants did not seek a jury trial." Lydon v. Commonwealth, 1980 Mass. Adv. Sh. 1915, 1918 n.5, 409 N.E.2d 745, 748 n.5 (1980).

In 1977 and 1978, however, the Supreme Court broadened the scope of defendant's double jeopardy protection in a way perhaps not foreseen by the Massachusetts system's reformers. In Burks v. United States, 437 U.S. 1 (1978), the Court overturned a prior line of cases and held that once "a reviewing court has determined that in a prior trial the evidence was

insufficient to sustain the verdict of the jury," the Double Jeopardy Clause forbids a retrial. 437 U.S. at 5 (record review made by a federal appellate court); accord, Hudson v. Louisiana, 450 U.S. 40 (1981) (record review made by a state trial court). Then in Jackson v. Virginia, 443 U.S. 307 (1979), the Supreme Court held that a federal habeas court must look to see whether a state conviction rests upon enough evidence to convince a rational trier of fact to find guilt beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970) (a conviction failing to meet that standard violates the Fourteenth Amendment "due process" clause). Petitioner believes that, under Jackson, the federal habeas court here properly determined that the evidence at the first trial was

constitutionally insufficient and, hence, under Burke, he cannot be retried--he is entitled to unconditional release from custody.

Before evaluating petitioner's argument, we shall describe the procedural context in which this case arises. The petitioner, Lydon, was charged with possessing implements designed to break open a "depository" (here, an automobile) in order to steal money or property from it. He chose to participate in the two-tier system. He was convicted at the first tier. The trial judge rejected his claim that the prosecution had not presented evidence of one key element of the offense charged, namely, an intent to steal money or property from the car.

Lydon asked for a trial de novo by a jury. He then asked the jury-trial

judge to dismiss the charges on double jeopardy grounds. The motion was denied. A single justice of the Massachusetts Supreme Judicial Court, however, stayed the second trial and heard Lydon's claim. The justice was willing to assume the evidence was inadequate, and, on that assumption, asked the full court in the exercise of its "superintendence powers," Mass. Gen. Laws ch. 211, § 3, to answer two questions:

> 1. Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, . . . when the evidence at the bench trial was insufficient to warrant a conviction?
>
> 2. Assuming that a jury trial in such an instance would be a denial of a defendant's right not to be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level . . .?

Lydon v. Commonwealth, 1980 Mass. Adv. Sh. at 1916 n.3, 409 N.E.2d at 747 n.3.

The Supreme Judicial Court answered the first of these questions in the negative. It reasoned, first, that the initial trial judge had held that the evidence against Lydon was sufficient; since the state system did not provide for any review of that holding, no double jeopardy claim could arise. Second, regardless of whether the evidence was sufficient, there was no consitutional injury. Lydon chose to enter a system where a new trial would be his for the asking; in return, he must accept the fact that his only remedy would be a new trial. The Double Jeopardy Clause protects against governmental oppression, here, there was no such oppression because Lydon had volunteered to participate in the

two-tier system.

The Supreme Judicial Court went on to answer the second question affirmatively, but added that its answer was "largely academic." Since Lydon had no double jeopardy right, the second trial court would not pass upon the adequacy of the evidence at the first trial.

Lydon sought certiorari, which was denied, and then sought habeas corpus. The federal district court, in the habeas proceeding, reviewed the original trial transcript and found the evidence to be constitutionally insufficient. The district court concluded that retrial was barred by the Double Jeopardy Clause. It ordered Lydon released and prohibited his retrial.

The Commonwealth has appealed. It obtained a stay of the district court's

order pending this appeal. The Commonwealth has stated it will not retry the petitioner until the appeal is decided. Lydon is currently released on "personal recognizance."

II

We must first decide whether the district court had authority to review the record of Lydon's bench trial to determine whether the evidence was sufficient for conviction. Otherwise, the district court, faced with an authoritative state court finding that the evidence was insufficient, would have seen no double jeopardy problem. We believe that the district court had this authority.

1. Contrary to the Commonwealth's contention, Lydon met the technical "custody" requirements of the two habeas

corpus statutes relevant here, 28 U.S.C. § 2241(c)(3) and 28 U.S.C. § 2254. The first of these statutes authorizes the writ to be issued on behalf of "a prisoner . . . in custody in violation of the Constitution . . . of the United States . . . ." The second authorizes its issuance on behalf of "a person in custody pursuant to the judgment of a state court" on the ground, (among others) "that he is in custody in violation of the Constitution . . . ."

It is now well established that release on personal recognizance is "custody" within the meaning of both of these corpus statutes. Hensley v. Municipal Court, 411 U.S. 345 (1973). Personal recognizance subjects an individual to restaints "not shared by the public generally," for "state judicial officers may demand his

presence at any time," and "[d]isobedience is itself a criminal offense." 411 U.S. at 351. In this instance, if Lydon failed to appear for his jury trial, his original sentence could be reimposed. Mass. Gen. Laws ch. 278, § 54. Moreover, although the state characterizes Lydon's choice of a new trial as a choice that "wipes out" the first court's judgment, the fact is that Lydon is under special restraint because he was found guilty at the bench trial; otherwise, he would have been released. Lydon is essentially in the same position as the defendant in Hensley, who "remained at large under an order of the state court staying execution of his sentence." 411 U.S. at 347. We therefore believe that Lydon is in "custody" under the less restrictive language of § 2241(c)(3) and also under

the more restrictive language of § 2254, which requires that the custody be "pursuant to the judgment of a state court." Cf. Thames v. Justices of the Superior Court, 383 F. Supp. 41, 43 (D. Mass. 1974) (release on bail after a mistrial is "custody" under both § 2254 and § 2241).

2. Once the technical custody problems are met, at least as a general matter, a habeas court can review a petitioner's claim that a state court conviction rests upon insufficient evidence. Jackson v. Virginia, supra. The constitutional basis for such review arises from the fact that if, "after viewing the evidence in the light most favorable to the prosecution," no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," the state

conviction violates the Fourteenth Amendment's "due process" requirements. 443 U.S. at 219. See Johnson v. Louisiana, 406 U.S. 356, 362 (1971); In re Winship, supra. And, "assuming that state remedies have been exhausted, and that no independent and adequate state ground stands as a bar, it follows that such a claim is cognizable in a federal habeas corpus proceeding." Jackson v. Virginia, 443 U.S. at 321 (citations omitted).

3. While we recognize potential practical problems related to the proper timing of habeas "evidence sufficiency" review, cf. Stevens v. Circuit Court of Milwaukee County, 675 F.2d 946 (7th Cir. 1982), we believe that here review of Lydon's claim before state court retrial was appropriate. For one thing, Lydon's sufficiency of the evidence claim is

part of his double jeopardy attempt to prevent the retrial with which he is directly and immediately threatened. He seeks habeas relief now to avoid the very psychological and material hardships of a second trial that the Double Jeopardy Clause seeks to prevent. See Green v. United States 355 U.S. 184, 187-88 (1957). Unless habeas review is available before the second trial, a meritorious "evidence insufficiency" claimant would have to suffer those hardships before winning his case. Benson v. Superior Court Department of the Trial Court of Massachusetts, 663 F.2d 355, 359 (1st Cir. 1981). This consideration led the Supreme Court to characterize a double jeopardy ruling in a federal trial court as a "collateral order," allowing an immediate appeal under Cohen v.

Beneficial Industrial Loan Corp.,337 U.S. 541 (1949). Abney v. United States, 431 U.S. 651 (1977). This consideration does not settle the timing question, for Lydon has a legitimate double jeopardy claim only if he can reverse the earlier ruling that the evidence was sufficient. And it is the timing of this latter review that is at issue. See, e.g., United States v. Becton, 632 F.2d 1294 (5th Cir. 1980), cert. denied, 102 S.Ct. 141 (1981). Nonetheless, this factor argues in favor of speedy habeas review.

For another thing, all state remedies on the evidence sufficiency claim have been exhausted, thus satisfying the explicit exhaustion requirement of § 2254 and the similar implicit requirement of § 2241. See Braden v. 30th Judicial Circuit Court of

Ky., 410 U.S. 484, 490 (1972). None of the state courts to which Lydon brought his claim actually ruled on the sufficiency of the evidence, and, under the theory announced by the Massachusetts Supreme Judicial Court, the first-tier judge's determination that the evidence was sufficient will never be reviewed anywhere within the Massachusetts system. See Lydon v. Commonwealth, 1980 Mass. Adv. Sh. at 1924, 409 N.E.2d at 752.

Moreover, we are aware of no "independent and adequate state ground" now barring review. Jackson v. Virginia, 443 U.S. at 321. See Estelle v. Williams, 425 U.S. 501 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Fay v. Noia, 372 U.S. 391, 430-34 (1963). Indeed, Lydon's conviction at the second trail would

not, we should think, bar a federal habeas court from examining the sufficiency of the evidence at the first trial. Cf. Fay v. Noia, 372 U.S. at 433-34. Jackson mandates a federal "evidence sufficiency" examination; and, as we shall discuss further in Part IV below, Burks invalidates a second trial where the first conviction rests upon insufficient evidence.

Further, Massachusetts has not sought to postpone habeas review until after the second trial. Rather, the Supreme Judicial Court delayed Lydon's retrial while it considered his double jeopardy claim. The Commonwealth did not attempt to proceed with the second trial pending resolution of Lydon's federal claim. It has not argued that a speedy retrial is important.

Finally, in principle we deal here with habeas review where there is no state appellate review. In principle, habeas then involves only one set of review procedures. Since most states typically provide one such review procedure prior to a retrial--where, for example, a defendant appeals a conviction-the additional delay that habeas may bring here is likely to be no greater than in the typical state case with state appellate review before retrial.

At the same time, we note two factors that militate against allowing habeas review prior to retrial. First, were such review generally available, it might create practical problems when a defendant convicted in a state court appeals, alleging "evidence insufficiency" as one of a number of

grounds for reversal. The state appellate courts may well reject the "evidence insufficiency" claim, yet order a retrial on other grounds. Can the defendant in such a case then force the state to run the gauntlet of federal habeas proceedings on the "evidence insufficiency" issue prior to his state retrial? Can he obtain delay of the retrial, regardless of the merits of his claim, and thereby, through elapsed time and fragile memory, reduce his chances of subsequent conviction?

Second, to hold that defendants generally seek federal habeas "evidence insufficiency" review prior to a state retrial may seem anomalous when contrasted with Fourth, Fifth and Ninth Circuit cases denying a federal defendant appellate review of a similar claim prior to federal retrial. United

States v. Ellis, 646 F.2d 132 (4th Cir. 1981); United States v. Rey, 641 F.2d 222 (5th Cir.), cert. denied, 102 S.Ct. 318 (1981); United States v. Becton, supra; United States v. Carnes, 618 F.2d 68 (9th Cir.), cert. denied, 100 S.Ct. 3028 (1980). In each of these cases, jury deadlock resulted in a mistrial. The defendant's motion for acquittal on the basis of the insufficiency of the evidence was denied, and a new trial was ordered. The defendant then moved to dismiss on the grounds of double jeopardy, in turn, based on a claim of "evidence insufficiency." The appellate court in each case dismissed the appeal, on the grounds that it was interlocutory and not appealable under the collateral order exception to the finality rule. The essence of the court's position was that the defendant was merely appealling

the trial court's decision that the evidence was constitutionally sufficient. Such an issue, each court held, was not "collateral" under the Cohen/Abney test; but rather was directly involved in the merits of the case. Therefore, the appellate court would not review that decision, even to reach the double jeopardy issue. There are other circuits taking a different view. See United States v. McQuilkin, 673 F.2d 681 (3d Cir. 1982) (interlocutory appeal on "evidence insufficiency" allowed in federal case); Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981) (habeas review of evidence insufficiency allowed prior to state retrial). We do not choose between the views of the Fourth, Fifth and Ninth Circuits on the one hand, and the Third and Sixth on the other. Rather, we

simply note that it would be odd if, under the view of most circuits, a federal defendant were denied interlocutory appeal, while a state defendant was entitled to receive federal habeas review before his retrial.

While we recognize the force of these latter two sets of arguments, we do not find them determinative here. For one thing, the practical problem of interfering with ongoing state proceedings might be mitigated through wise use of the habeas corpus court's power to stay those proceedings, see 22 U.S.C. § 2251, reserving use of that power for those cases that present a strong showing of likely success on the merits, and otherwise taking appropriate account of the "comity" principles discussed in Younger v. Harris, 401 U.S. 37 (1971). Compare Robinson v. Wade,

686 F.2d 298, 302-03 n.7 (5th Cir. 1982), and Baker v. Metcalfe, 633 F.2d 1198, 1200 n.3 (5th Cir.), cert. denied, 102 S.Ct. 2085 (1981), with Stevens v. Circuit Court of Milwaukee County, supra, and Sparks v. Garrison, 446 F. Supp. 649 (M.D.N.C. 1978), aff'd 612 F.2d 1310 (4th Cir. 1979). Insofar as the habeas court takes account of the need for speedy retrials, the sense of anomaly with the federal "interlocutory appeal" cases (which themselves rest on the need for workable procedures) is diminisned.

For another thing, the case before us is one in which, for reasons previously set out, the need for postponement of habeas review is minimal. We therefore restrict our holding to such a case. We conclude that habeas review of "evidence

insufficiency" was proper at this time in the case before us. But, we specifically decline to extend our holding to other cases not characterized by the several factors favoring review listed here. We postpone to another day any authoritative decision about "habeas timing" in such other cases.

III

The district court reviewed the record and concluded that the evidence was, in fact, insufficient. The Commonwealth's complaint alleged that Lydon possessed implements designed to break open a "depository" (here an automobile), with the intent to steal money or property from it, in violation of Mass. Gen. Laws ch. 266, § 49. The evidence at trial was as follows. A plainclothes police officer testified

that late one night he observed the defendant and another man in the process of breaking into the right front window of a car. When the two had opened the car, both of them climbed into it. As the witness and other policemen moved in, an alarm went off in the car and both men climbed back out. On searching the defendants, the police found a bottle of whiskey. Nearby, they found a dentpuller and a screwdriver. The witness stated that the defendants had no time to take anything <u>from</u> the car. The evidence permitted an inference that the defendant intended to steal the car itself, that he intended to take it for a short ride, or that he merely intended to go to sleep in it. But under Massachusetts law, it was impossible to say that the Commonwealth had shown beyond a reasonable doubt that the

defendant intended to steal money or property from the car.

This was the view of a Massachusetts court in an almost identical case. The court stated,

> Breaking into an automobile merely with the intent to use it is not so 'remote according to the ordinary course of events' as to allow us to discount such an intent in this case and permit the jury to conclude that there was an intent to steal from the automobile merely from the breaking.

Commonwealth v. Armenia, 4 Mass. App. Ct. 33-39, 340 N.E.2d 901, 904-05 (Mass. App. 1976) (citation omitted). Because the Commonwealth had not shown "an intent to steal from the automobile," the court set the jury's verdit aside.

Having examined these facts and the Massachusetts authority interpreting the statute, we must conclude that the federal district court's determination

that the evidence was not constitutionally sufficient to support conviction is not erroneous. This is not to say that defendant was innocent of all crimes. But one can be convicted only of the crime charged. And, as to that crime, an intent to steal from the automobile was not shown.

IV

Once a habeas court has decided that the evidence at Lydon's first trial was constitutionally insufficient--that no rational trier of fact could have found him guilty as charged beyond a reasonable doubt--the Double Jeopardy Clause, as interpreted in Burks, forbids his retrial. As classically stated:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should

> not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). In applying this purpose, the Supreme Court has attached special weight to judgments of acquittal, Tibbs v. Florida, 102 S. Ct. 2211, 2218 (1982); see United States v. DiFrancesco, 449 U.S. 117, 129 (1980); United States v. Scott, 437 U.S. 82, 91 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). "A verdict of not guilty whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial." Tibbs v.

Florida, 102 S. Ct. at 2218; see, e.g., United States v. Martin Linen Supply Co., 430 U.S. at 564; United States v. Ball, 163 U.S. 662, 666-71 (1896). And, in Burks, the Court specifically held that a reversal of a conviction because the evidence was constitutionally insufficient has the same effect as an acquittal, for it means that no rational fact finder could have found the defendant guilty. Burks v. United States, 437 U.S. at 16; Tibbs v. Florida, 102 S. Ct. at 2217-18.

The underlying rationale, explained fully in Burks, is that the prosecution gets one full and fair opportunity to muster its evidence. If it nonetheless produces a case "so lacking that it should not have even been submitted to the jury," then it ought not to have

another opportunity to supply additional evidence.

> Since we necessarily afford absolute finality to a jury's verdict of acquittal--no matter how erroneous its decision--it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

437 U.S. at 16 (emphasis in original). Tibbs v. Florida, 102 S. Ct. at 2217-18; Hudson v. Louisiana, 450 U.S. at 43. To allow the prosecution that opportunity--to learn from the first trial and to produce a more adequate case the second time--is to allow the type of oppression the Double Jeopardy Clause was designed to guard against. Burks v. United States, 437 U.S. at 11; Green v. United States, supra.

Where "evidence insufficiency" is found, the reasons that typically allow retrial when an appellate court finds trial error are not present. As the Court explained in Burks,

> Reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence . . . . When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. . . .
>
> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution

> cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble.

Burks v. United States, 437 U.S. at 15-16 (footnote omitted).

We have quoted at some length from the Supreme Court's recent double jeopardy cases because both the Court's language in these cases and the rationale that it embodies make clear that the Double Jeopardy Clause forbids retrial here. The prosecution had a full and fair opportunity to present its evidence. The evidence was such that no rational trier of fact could have found Lydon guilty of the crime charged. Had the trier of fact acquitted Lydon, Massachusetts law would have barred his retrial. The process of judicial review has conveniently pinpointed the evidence which was lacking, and retrial simply

gives the prosecutor another opportunity to supply it. In these respects, it is difficult to see any significant difference between this case and the situation in Burks of a trial followed by appellate reversal for insufficient evidence.

The Supreme Court has twice rejected double jeopardy attacks on the constitutionality of the Massachusetts, and other similar two-tier systems. However, neither of these cases affect our conclusion here. Colton v. Kentucky, 407 U.S. 104 (1972), concerned the question of the state's power to impose an enhanced sentence at the second trial; it is not directly relevant to the issue before us. Ludwig, decided prior to Burks, holds that, as a general matter, the Double Jeopardy Clause does not forbid the

retrial de novo of one previously convicted. Its reasoning, however, supports a finding of unconstitutionality here.

The Ludwig Court reached its conclusion primarily by drawing a parallel between a "two-tier" defendant seeking a new trial after conviction, and an ordinary convicted defendant seeking a new trial on appeal. The Court wrote in 1975:

> The Massachusetts system presents no danger of prosecution after an accused has been pardoned; nor is there any doubt that acquittal at the first tier precludes reprosecution. Instead, the argument appears to be that because the appellant has been placed once in jeopardy and convicted, the State may not retry him when he informs the trial court of his decision to "appeal" and to secure a trial de novo.
>
> Appellant's argument is without substance. The

> decision to secure a new trial rests with the accused alone. A defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial. Under these circumstances, it has long been clear that a State may reprosecute. United States v. Ball, 163 U.S. 662 (1896). The only difference between an appeal on the record and an appeal resulting automatically in a new trial is that a convicted defendant in Massachusetts may obtain a "reversal" and a new trial without assignment or error in the proceedings of the first trial.

427 U.S. 631-32. This parallel between the "two-tier" trial and the ordinary trial plus appeal supported the Massachusetts system's constitutionality prior to Burks. But Burks carved out an exception to the general rule that retrial is permissible. Since Burks

requires release when the evidence was constitutionally insufficient at the first trial, given the analogy upon which Ludwig rested, Ludwig requries the same result with the two-tier system.

The single respect in which this case differs from both Ludwig and the ordinary instance considered in Burks is that, under the modification made in the Court Reorganization Act of 1978, a defendant now may freely choose whether to subject himself to the system's first tier. If he wishes, he can proceed directly to the second. The Massachusetts Supreme Judicial Court believed this fact critical. It apparently felt that a defendant who had voluntarily chosen to subject himself to the first tier thereby waived whatever rights he may have had to any relief other than a new trial. Such a waiver

would be reasonable in light of the unusual benefit the system grants him, namely a new trial for the asking.

While we agree that it would be reasonable to waive a Burks-type right to obtain this benefit, we do not agree that the defendant did so here. It is clear, that where constitutional rights are at issue, there must be an "intentional relinquishment of a known right or privilege" before they can be waived. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Although prior to Burks the existence of a constitutional right may have been in doubt, after that case, it is apparent that the harm at issue--the prosecutor's second chance to supply constitutionally sufficient evidence--has a constitutional dimension. And Burks itself indicates that a waiver of the defendant's right

to avoid that harm is not to be implied lightly. That case specifically denied that a defendant's decision to seek a new trial on appeal automatically waived his right (if the evidence proved insufficient) to avoid a new trial altogether.

There was no intentional relinquishment of the right at issue in this case. There is no indication that the defendant clearly understood he was waiving any right to potential freedom from retrial; to the contrary, if anything, he believed that the state could not retry him again should the evidence at the first trial prove constitutionally insufficient. And, he has vigorously asserted this claim throughout.

There is no special circumstance present here that suggests that anything

less than an explicit waiver is appropriate. Amici argue that the district court's ruling would significantly impair the workings of the present system. But that is not so. The present system fully informs defendant of their choice and its implications for their right to a jury trial. Indeed, the trial must "be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of [trial de novo]." Mass. Gen. Laws ch. 218, § 26A. Rule 21(A) of the Initial Rules of Criminal Procedure for the District Court provides:

> The oral notice of right to first-instance jury trial shall include a statement to the defendant that is he or she waives this right, he or she will receive a trial before a judge and if not satisfied with the results of

that trial will be able to appeal for a new trial before a jury.

The Massachusetts Supreme Judicial Court has itself suggested that consideration "be given to enlarging the consent form so that the defendant acknowledges that his only avenue of relief from any error in the bench trial is a trial de novo." Lydon v. Commonwealth, 1980 Mass. Ad. Sh. at 1924 n.13, 409 N.E.2d at 751 n.13. We see no reason to indulge in the legal fiction of "implied consent" or "constructive waiver" when the reality could proceed to a full, ordinary single level jury trial if he did not choose to waive the right here at issue. It may be that many defendants would waive the Burks-type right, for it would come into play only in a very limited circumstance, namely, when a first-tier judge wrongly

concludes that the evidence was constitutionally sufficient to convict and a later court reverses the ruling. But, whether or not to waive is a decision that an informed defendant ought to make.

For these reasons, we believe that the district court properly issued a writ of habeas corpus. We note the Commonwealth's argument that the district court lacks the additional power specifically to enjoin a second trial. But, rather than explore the merits of this technical question of law, we shall simply follow the path of the court in Delk v. Atkinson, 498 F.Supp. 1282 (M.D. Tenn. 1980), rev'd on other grounds, 665 F.2d 90 (6th Cir. 1981) which found it "unnecessary to order specific injunctive relief barring state retrial . . ., because the Court

assumes that the State will act in good faith in light of the Court's decision and dismiss the charges against the petitioner." 498 F. Supp. at 1284. The appropriate relief is simply issuance of the writ providing Lydon his freedom from being required to answer any summons to a second trial. We have no reason to believe the Commonwealth wil seek to retry him unless this decision is reversed.

Affirmed.

CAMPBELL, Circuit Judge (Dissenting). The court may be right. Certainly Judge Breyer's opinion deals scrupulously with the issues, and I do not question the intelligence and logic reflected in my colleagues' decision. Yet I see this as one of those cases where the relentless application of secondary precepts developed in other, very different settings leads ultimately to a foolish and wrong result -- a result not dictated by the Constitution, and one which has the unfortunate effect of undermining a useful and fair state procedure.

My colleagues are sensitive to the latter problem. The court's opinion relfects its deep concern over the harm to the Massachusetts two-tier system which may now occur, as a result of our judgment, from frivolous petitions and appeals alleging insufficiency of

evidence and double jeopardy. Whether there are ways around this, through more elaborate waiver forms or other mechanisms, I do not know. I do know that the Massachusetts system is likely to become more costly and less coherent as a result of our decision -- at a time when virtually every commentator, including the Chief Justice of the United States, is decrying the diminishing ability of both state and federal judicial systems to cope with the caseload. Moreover, I fear that decisions such as this reflect an ongoing, perhaps irreversible tendency of federal courts to treat subsidiary principles announced in constitutional decisions as if they were propositions of plane geometry, and to extend and apply them rigidly, with the unfortunate result that healthy experimentation and

diversity at state and local levels is made increasingly less possible.

Here, building on Burks v. United States, 437 U.S. 1 (1978), our court interrupts the practical functioning of Massachusetts' two-tier system -- a fair and useful system which the state offers as an elective option to criminal defendants charged with misdemeanors and lesser felonies. In Burks, the Court held that the double jeopardy clause prohibits a second trial following the reversal of a conviction obtained with insufficient evidence. Here, we fasten on the fact that a defendant convicted at a first-tier bench trial has no way to avoid a second-tier trial if he wishes to challenge the state's case either on the facts of the law: thus he must be "tried again" even if the earlier proceeding at which he was

convicted was lacking in sufficient evidence. To avoid this, we insist that he and other first-tier convicted defendants must be allowed to raise their insufficiency claims before the second trial so they can be discharged if they prevail. We thus throw a substantial monkey wrench in the two-tier system whose distinguishing feature and, indeed, supreme virtue is that it offers a second trial, not an appeal on the law.

I would contend that the reasonable way to analyze the double jeopardy issue in this case is to look at the Massachusetts system as a whole, not in isolated fragments. If this is done, I see little ground for serious concern that the policy underlying the double jeopardy clause is being offended.

To begin with, the two-tier system was not imposed on the defendant. Massachusetts defendants may elect to receive an initial jury trial followed by a conventional appeal. There is thus no issue of Massachusetts forcing Lydon to accept a system which provides, in the second stage, for a de novo trial rather than a conventional appeal.

Second, the two-tier procedure Lydon elected affords all the most basic double jeopardy protection that would be afforded in a more conventional system. As Massachusetts has long recognized, a judgment of acquittal at the first tier precludes later prosecution at the second level. And it is well established that trial de novo following a first-tier conviction does not ordinarily offend the double jeopardy

clause. Ludwig v. Massachusetts, 427 U.S. 618 (1976).

Third, the two-tier system affords distinct benefits to a criminal defendant not present in the more conventional system. These benefits flow from the very same aspect of the system which Lydon criticizes. Under the two-tier system, a defendant receives two full opportunities to be acquitted on the facts. The conventional American criminal system, unlike that in some European countries, permits virtually no appeallate review of factual determinations. The opportunities now afforded to suppress evidence on legal and constitutional grounds do not help on this score: indeed, the most worrisome ground for a possible miscarriage of justice -- misidentification by a witness --

remains largely untouched by the jurisprudence of the past generation. The Massachusetts two-tier system, however, allows the possibly innocent defendant two opportunities for acquittal on the facts. That is a benefit of no small dimension. For defendants generally, it is far more meaningful than retaining a right to appeal from the first trial on grounds of insufficient evidence. In foregoing the latter, convicted defendants gain the right not to be convicted finally unless the prosecution twice proves their guilt beyond a reasonable double.

Fourth, while the de novo trial allows the prosecution to put in a different and perhaps stronger case, the same is of course true for the defendant. Bearing in mind that, in the usual case, the first-tier court can be

expected to acquit where the evidence is insufficient, it will be the rare case where a convicted defendant with a valid insufficiency claim is forced to stand trial for a second time. The far more usual case will be that of the defendant convicted at the first tier on legally sufficient (if factually close) evidence. Under the Massachusetts system, that defendant gets the distinct benefit of a brand new trial, in which he has all the tactical benefits of knowing the prosecution's case and shifting his defenses to meet it.

Fifth, in the rare case of someone like Lydon who was convicted at the first tier on insufficient evidence, the defendant has no lack of opportunities for later vindication: first, he may be acquitted on motion after the prosecution puts in its case in the de

novo trial, assuming the judge feels the prosecution's evidence is insufficient. Second, the jury may acquit him at the second trial. Third, he may later win on an insufficiency claim relative to the second trial in a Massachusetts appellate court. While technically he is "tried again", the second stage proceeding can be regarded as but an enlarged, fact-sensitive part of a single, continuous course of judicial proceedings during which, sooner or later, a defendant receives more -- rather than less -- of the process normally extended to criminal defendants in this nation. To deny a state the right so to structure its optional criminal process is to approach saying that the Constitution imposes for all time a single model of criminal process.

Sixth, Lydon argues that the second-tier trial is unfair because it allows the prosecution to improve on its case -- to put in more evidence. As noted, any disadvantage would seem to be more than outweighed by the advantage to most defendants of being able to impove on their defense in the second trial. But beyond this, the likelihood of the prosecution's obtaining additional evidence would seem slight. The prosecution has every incentive to put in its best evidence in the first tier. If it does not, and acquittal results, it can never proceed again. Moreover, the stronger the showing, the more likely the defense is to accept a firstround conviction as final, without seeking a de novo trial. It follows that appellate review of the second conviction will commonly provide an

effective remedy in the rare instance in which both trial courts and the jury improperly assess the sufficiency of the evidence. With these safeguards in place, there is every reason to believe that the two-tier system -- if permitted to function without interruption -- will vindicate claims of evidentiary insufficiency.

Lydon's predicament illustrates the point. The court concludes that the evidence introduced at Lydon's trial failed to pass muster under the rule of Jackson v. Virginia, 443 U.S. 307 (1979). Yet the two-tier system, were it permitted to run its course, would surely correct the error. Of course, part of the process involves Lydon's submission to a second trial. But the second trial typically poses little threat that the Commonwealth will

present new, more substantial evidence; indeed, a review of the record suggests that there is probably no effective way to supply evidence of intent. And even if this were to occur in isolated cases, the result is hardly so unfair, when weighed against the system's countervailing benefits to defendants as a whole, as to warrant restructuring the whole system.

Finally, I return to the point first made -- that the two-tier system was not imposed on Lydon. Lydon's submission to a second trial is part of the bargain he struck with the Commonwealth when he chose the two-tier system with its distinct advantages as well as this one disadvantage. The Commonwealth requires a defendant who wishes to be tried in the two-tier system to sign a written waiver of his right to trial by jury.

At the time Lydon signed the waiver he was represented -- as the Commonwealth requires[1] -- by an attorney whose competence is undisputed. Any attorney, and indeed most clients, would know that in choosing the two-tier system, a defendant surrenders his right to challenge legal errors committed in the initial proceeding; in place of this right, he obtains the more important right to require a trial de novo, after which, of course, there is the conventional appellate process. See Mann v. Commonwealth, 359 Mass. 661, 664, 271 N.E.2d 331, 333-34 (1971). Lydon has never asserted that he lacked knowledge of the limited right of appeal

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1/ The Commonwealth requires defendants to be represented by counsel at the time they choose the two-tier system unless they have waived the right to counsel. See Mass. Gen. Lws. ch. 218 § 26A.

in the two-tier system. Thus, we may assume that he had a sufficient practical understanding of the consequences of his choice.

This court nonetheless holds that Lydon's intelligent, informed decision to be tried in the two-tier system did not constitute a waiver of his right to challenge the sufficiency of the evidence at his bench trial. The court does not conclude that the right is so fundamental as to defy any form of waiver. Rather it holds that Lydon's decision did not constitute an "intentional relinquishment of a known right." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). In so concluding, the court implies that a written waiver of the right would pass constitutional muster.

Thus, the court invites the Commonwealth to adopt a procedure that

insofar as I can determine, would have no practical impact on a defendant's choice of the two-tier system. Under the suggested written waiver procedures, a defendant would rely heavily on the advice and expertise of his attorney in deciding whether to waive his right to challenge evidentiary sufficiency. In making this strategic choice, the attorney would be called on to weigh precisely the same factors that Lydon's attorney presumably weighed in this case. The effect of the present opinion is to create the possibility of a host of new technicalities which may vitiate the practical usefulness of the de novo system. I would hold Lydon to the consequences of his choice.

In conclusion, I fear that the court's decision is a further step in locking the states into rigid,

formalistic criminal procedures, without regard to the actual justice or injustice of a given system, merely to satisfy refined, logical principles derived from prior cases decided in other contexts. Such an approach provides employment for attorneys, increases the expense of justice, and enlarges the possibility that a guilty person may get off on a technicality. It does little to advance the cause of justice. The Massachusetts two-tier system must be viewed as a whole, not forced through a strainer developed from cases dealing with a different system. If so viewed, I believe that it does not create double jeopardy. What it does do is provide a practical trial option with many advantages to both sides.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

MICHAEL LYDON, Petitioner	)	
v.	)	
THE JUSTICES OF THE BOSTON MUNICIPAL COURT ET AL., Respondents	)	CIVIL ACTION NO. 81-2311-G

MEMORANDUM AND ORDER ON HABEAS CORPUS PETITION

April 13, 1982

GARRITY, J.

Petitioner Michael Lydon seeks a writ of habeas corpus to prevent Massachusetts from trying him a second time pursuant to its two-tier trial system. Petitioner contends that a second trial under the circumstances of his case would violate the double jeopardy clause of the federal constitution. Respondents have moved to

dismiss on the grounds that the court lacks jurisdiction, that petitioner has not exhausted state remedies and that the double jeopardy clause does not bar a retrial as provided here.

Massachusetts provides that criminal defendants to certain specified charges who are to be tried in the Boston Municipal Court may elect to waive the right to a jury trial in the first instance and instead proceed to a bench trial. Mass. G.L. c. 218, §§ 26, 26A. If the defendant is dissatisfied with the result of the bench trial, he may then elect to proceed to a jury trial de novo as his sole available remedy. He need not, however, undergo the jury trial but may instead accept the verdict of the judge at the bench trial in the Boston Municipal Court. And, if he is acquitted after the bench trial, the

state cannot subject him to the second trial.

Petitioner, who was charged with illegal possession of burglarious implements, elected an initial bench trial and was convicted. His objection that the prosecution has failed to introduce sufficient evidence of the requisite illegal intent, an element of the crime, was denied. He then required a jury trial de novo, but prior to the jury trial moved to dismiss the charges on the ground that retrial would violate the double jeopardy clause. That motion was denied without a hearing. Lydon then petitioned the single justice session of the Supreme Judicial Court for relief under G.L. c. 211, § 3. The prosecution conceded, and the single justice concluded, that the evidence had in fact been insufficient to convict.

The single justice did not, however, report that finding to the full Supreme Judicial Court but instead stayed the trial and reported two other questions to the full court: Whether a defendant would be denied his right not to be placed in double jeopardy if required to go through a jury trial requested by him when the evidence at the bench trial was inadequate to convict and whether, assuming a jury trial would violate the double jeopardy clause, the jury trial judge could reconsider the sufficiency of the evidence if the judge at the bench trial had decided it was sufficient. The S.J.C. held, in a 5-2 decision, that the jury trial under the Massachusetts two-tier system did not violate the double jeopardy clause where the initial conviction was supported by insufficient evidence. All seven

justices, however, believed that if such a jury trial would violate the double jeopardy clause, the jury trial judge could reconsider the adequacy of the evidence at the first trial. Lydon subsequently filed his petition in this court for habeas relief. The court received briefs and heard argument on November 4, 1981.

A district could has jurisdiction to consider an application for a writ of habeas corpus on behalf of an individual in custody pursuant to judgment of a state court, only if the individual "is in custody in violation of the Constitution of laws or treaties of the United States", 28 U.S.C. § 2254(a), and has exhausted available state remedies, 28 U.S.C. § 2254(b). Petitioner has satisfied the jurisdictional prerequisites.

The "in custody" requirement of the habeas corpus statute does not condition habeas jurisdiction on actual physical confinment or restraint. Rather, it refers to various restraints on liberty "not shared by the public generally." Jones v. Cunningham, 1963, 371 U.S. 236, 240. Thus, an individual who has been released on his own recognizance following conviction is "in custody" within the meaning of the habeas corpus statute. Hensley v. Municipal Court, 1973, 411 U.S. 345. Petitioner is such an individual.

Although an individual released on bail or on his own recognizance would be "in custody" he would not necessarily be able to petition for habeas relief. Rather, "he must still contend with the requirements of the exhaustion doctrine if he seeks habeas corpus relief in the

federal courts." Hensley v. Municipal Court, supra at 353.

Defendants here point out, however, that 28 U.S.C. § 2254(a) confers jurisdiction on this court to entertain a habeas petition brought by one in custody pursuant to a state court judgment "only on the ground that he is in custody in violation of the [United States] Constitution" or other federal law. Here, defendants argued, petitioner does not challenge the constitutionality of his custody but only the ability of the court to proceed with his jury trial de novo. We reject this argument.

First, petitioner implicitly claims that "he is in custody in violation of the constitution." Had the court at petitioner's bench trial found petitioner not guilty, there would, of

course, be no basis for the imposition of bail or other custody. Here petitioner contends that the evidence at the bench trial was insufficient to convict him so that he should have been found not guilty. A second trial, petitioner contends, would violate his rights under the double jeopardy clause. Yet the prospect of the second trial constitutes the basis for subjecting petitioner to custody. Therefore, petitioner's allegation is, essentially, that the custody violates the Constitution.

Second, it often is appropriate to assume jurisdiction to consider the merits of a pretrial writ of habeas corpus where petitioner claims the pending trial would place him in jeopardy a second time for the same offense. "Because the double jeopardy

clause is designed to protect a defendant not only from double conviction but also from being subjected twice to the trial process itself . . . a federal court is in the extraordinary position of having no way to protect a defendant's constitutional rights other than to consider a petition before trial." Benson v. Superior Court Department of the Trial Court of Massachusetts, 1 Cir. 1981, 663 F.2d 355, 359; cf. Abney v. United States, 1977, 431 U.S. 651 pretrial order denying motion to dismiss indictment is appealable to preserve defendant's double jeopardy rights). Thus, we conclude that the requirements of 28 U.S.C. § 2254(a) are satisfied where an individual who is in custody pending a trial asserts that the trial would violate the double jeopardy clause.

For habeas jurisdiction to exist, however, the petitioner must also have exhausted available state remedies. 28 U.S.C. § 2254(b). Even where the petition is based on a double jeopardy claim, the petitioner retains some responsibility to exhaust pretrial opportunities to raise that claim before the state court. Benson v. Superior Court Department of the Trial Court of Massachusetts, supra at 359. Petitioner here has done so. As recounted above, Lydon (a) moved to dismiss charges against him on the grounds that the evidence at the bench trial was insufficient, (b) petitioned the single justice session of the S.J.C. for relief from the denial of that motion, (c) presented the same claim he presents here to the S.J.C., and (d) petitioned the United States Supreme Court for a

writ of certiorari, which was denied. He has exhausted all available state remedies short of submitting to the second trial. Benson requires that he do no more. See also Drayton v. Hayes, 2 Cir. 1979, 589 F.2d 117, 120-21. To hold that the exhaustion requirement means that petitioner must face a second trial before seeking habeas relief might subject him to one of the evils which the double jeopardy clause proscribes--multiple trials--in order to qualify for a determination of whether the trial violated that clause.

Having determined that this court has jurisdiction to consider this habeas petition, we turn now to petitioner's substantive claim that application of the Massachusetts two-tier system violated rights the double jeopardy clause protects. The corpus of writing

on this case already includes two scholarly opinions by justices of the S.J.C. which clearly present the opposing argments, Lydon v. Commonwealth, 1980 Mass. Adv. Sh. 1915, 409 N.E. 2d 745, cert. denied 1980, 449 U.S. 1065, and a lengthy law review discussion. See Comment, "Double Jeopardy Problems Presented by Two-Tier Systems," 69 Georgetown Law Journal 1525 (1981). We will not review and discuss again the competing arguments which Justices Wilkins and Liacos have so carefully presented and instead will incorporate their opinions by reference and confine our treatment to stating the considerations which ultimately have influenced our decision.

To begin with, we do not believe that any prior case cited by petitioner or respondent covers the precise

situation present here. In Burks v. United States, 1978, 437 U.S. 1, the Supreme Court held that the double jeopardy clause precludes retrial of a defendant whose conviction had been reversed by an appellate court solely for insufficient evidence even if defendant moved for a new trial. Recently, the court held in Hudson v. Louisiana, 1981, 450 U.S. 40, that Burks applies also when the trial court judge on a motion for a new trial, rather than a higher court on review, determines that the evidence was insufficient. This case differs from Burks in two ways which Justice Wilkins pointed out. Burks did not deal with a two-tier system. Moreover, unlike Burks, here no reviewing court has ruled, or would have the opportunity to rule that the evidence at the bench trial was

insufficient. Lydon v. Commonwealth, supra at 1919-20. Hudson, too, is distinguishable since the jury trial court in the present case denied Lydon's motion to dismiss. Cases upon which respondent relies, particularly Ludwig v. Massachusetts, 1976, 427 U.S. 618, and Colten v. Kentucky, 1972, 407 U.S. 104, in which the Supreme Court upheld two-tier systems, including the previous Massachusetts provision, against double jeopardy attacks, are also not controlling. Those cases did not address the situation in which evidence at the first trial was insufficient. See Lydon v. Commonwealth, supra at 1927 n. 1 (Liacos, J., dissenting). Moreover, those cases antedated Burks and rested on a premise that Burks substantially altered. The Court made that premise explicit in Ludwig, the

case in which it upheld the Commonwealth's prior two-tier system, when it said: "A defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial. Under these circumstances, it has long been clear that the State may reprosecute." Ludwig v. Massachusetts, supra at 631-32. After Burks, however, a defendant who gains a reversal based on insufficient evidence at the first trial may no longer be reprosecuted. Thus, the Massachusetts system at issue in Ludwig no longer parallels the constitutional norm and Ludwig accordingly does not direct the outcome here.

Although the prior Supreme Court decisions may be distinguished in some particulars, we conclude based on the principles they represent that retrial of Lydon under the Massachusetts two-tier system would deny him rights protected by the double jeopardy clause if his conviction was, in fact, based on insufficient evidence. We take Burks as our starting point. It held that the double jeopardy clause of the Fifth Amendment confers a constitutional right on criminal defendants not to be retried when there was insufficient evidence to convict at the first trial. That rule also applies to state defendants, Greene v. Massey, 1978, 437 U.S. 19, and to defendants who seek a new trial, Burks v. United States, supra at 17.

We are mindful, of course, that the Constitution does not require states

generally to provide appellate review for criminal convictions. Griffin v. Illinois, 1956, 351 U.S. 12, 18, 21, 27; McKane v. Durston, 1894, 153 U.S. 684. But we do not believe that that rule, coupled with the fact that a state chooses not to provide for review of a bench trial verdict, immunizes the state from federal constitutional promises. Burks does not become relevant, in our view, only after a reviewing court has found the evidence insufficient to convict. Rather it bestows a constitutional right upon defendants not to be retried when the initial conviction rests on insufficient evidence. The state is duty-bound to protect that right. Recognizing that double jeopardy rights must be protected prospectively, courts have fashioned special procedures to do so. See, e.g.,

Abney v. United States, supra; Benson v. Superior Court, supra. Respondents' preoccupation with whether there was an appellate determination of insufficient evidence strikes us as "a formal nicety wholly unrelated to the purposes of the double jeopardy clause." Lydon v. Commonwealth, supra at 1928 (Liacos, J., dissenting).

Lydon did not waive the protection against double jeopardy either by electing initially a bench, rather than jury, trial or by moving for a jury trial following his initial conviction. There is no evidence that Lydon had a "meanginful choice" and made a "voluntary knowing relinquishment of a right," Green v. United States, 1957, 355 U.S. 184, 191-92, in submitting initially to a bench trial since it is not clear that he appreciated that in so

doing he was waiving rights protected by the double jeopardy clause. And Burks makes it clear that it "cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." Burks v. United States, supra at 17. See also Hudson v. Louisiana, supra.

Since conducting a jury trial de novo would abridge rights the double jeopardy clause protects, if Lydon's conviction rested on insufficient evidence, we conclude that petitioner does state a claim upon which relief can be granted and so deny respondent's motion to dismiss. We turn now to the merits of petitioner's claim. The question that remains is whether the evidence at the first trial was insufficient. Justice Wilkins, who considered the case in the single

justice session, concluded at page three of his "Reservation and Report of Questions Arising in the Plaintiffs' Petition for Relief Under G.L. c. 211, S 3" that "the evidence was not sufficient to warrant guilty findings." The S.J.C. majority made clear, in an opinion Justice Wilkins wrote, that he "did not sit as a reviewing court in determining the sufficiency of the evidence" but rather framed questions for the full court to consider. Lydon v. Commonwealth, supra at 1918 n. 6. Justice Wilkins also observed in the abovecited "Reservation and Report" that the "Commonwealth concedes that the evidence presented was insufficient to warrant a finding of guilty on the charges as set forth in the complaint."

Since Justice Wilkins did not sit as a reviewing court in assessing the

sufficiency of the evidence, we do not treat his "Reservation and Report" as an adjudication on the merits.[1/] Rather, in order to make an independent determination of the sufficiency of the evidence, we have reviewed the "Transcript of the Evidence" at Lydon's bench trial on November 9, 1979, a copy of which, stipulated by the parties to be accurate, is Appendix C to the petition. Justice Wilkins pointed out at page 3 of his "Reservation and Report" that the Commonwealth's complaint alleged that Lydon knowingly possessed implements designed to break open a depository (here an automobile)

1/ We do, however, adopt and incorporate by reference the helpful discussion and reasoning on pages 3 to 7 of his "Reservation and Report" to the extent pertinent to our determination of the sufficiency of the evidence.

to steal money or property from it, in violation of Mass. G.L. c. 266, § 49. The trial transcript contains "no evidence that Lydon intended to steal money or property from the automobile, an essential element of the crime charged. Thus, we conclude, based on our review of the transcript, that the evidence at petitioner's bench trial was insufficient to convict him. It follows from the earlier discussion of this memorandum that a trial de novo under Massachusetts' two-tier system would violate petitioner's double jeopardy rights. Accordingly, we grant the petition for a writ of habeas corpus.

We note, in concluding, that our holding, while granting the immediate petitioner's writ, need not eliminate nor even work substantial change in the operation of Massachusetts' two-tier

system. The defects could be cured in several ways. The state could expand the initial consent process so that a judicial officer would explain that if the defendant elected to begin with a trial his only recourse from a conviction would be a jury trial de novo, Lydon v. Commonwealth, supra at 1924 n. 13, and the constitutional significance of that waiver. The state could, alternatively, provide a forum to review the bench trial verdict. Indeed, the S.J.C. in Lydon unanimously agreed that if the two-tier system did infinge double jeopardy rights a judge at the jury trial session could properly decide a double jeopardy challenge to the sufficiency of the evidence. Lydon v. Commonwealth, supra at 1926, 1931. Or, the state could fashion a system that would preclude the prosecution from

offering new evidence at the second level. See, e.g., Swisher v. Brady, 1978, 438 U.S. 204.

ORDER

Consistent with, and pursuant to, this memorandum of law, we deny respondents' motion to dismiss and grant petitioner's petition for a writ of habeas corpus and, accordingly, order that petitioner be released from his unconstitutional custody, namely, the personal recognizance of $500 to ensure his appearance before the jury session of the Boston Municipal Court, and that he not be retried before the jury session of the Boston Municipal Court on the same charges for which he was already tried in the first tier of the two-tier system and convicted based on insufficient evidence. Since we

understand that petitioner, by claiming a jury trial de novo, wiped out the bench trial verdict and sentence so that petitioner is no longer subject to that sentence, we take no further action.

MICHAEL LYDON & another[1] vs. COMMONWEALTH.

Suffolk. May 6, 1980. — August 22, 1980.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, WILKINS, LIACOS, & ABRAMS, JJ.

Constitutional Law, Double jeopardy. *Supreme Judicial Court*, Superintendence of inferior courts. *Practice, Criminal*, "Two-tier" court system.

CIVIL ACTION commenced in the Superior Court for the county of Suffolk on February 5, 1980.

The case was reported by *Wilkins*, J.

Bonnie Spaccarelli Hannon (*Eva S. Nilsen* with her) for Michael Lydon.

Kenneth D'Arcy for Robert McDonald.

Michael J. Traft, Assistant District Attorney, for the Commonwealth.

Richard J. Hayes, William J. Leahy, Martin R. Rosenthal & Brownlow M. Speer, for the Massachusetts Defenders Committee, amicus curiae, submitted a brief.

WILKINS, J. This petition for relief under the general superintendence powers of this court (G. L. c. 211, § 3) is one of three similar cases decided today that raise questions concerning the application of the principles of *Burks* v. *United States*, 437 U.S. 1 (1978), to criminal cases in which the accused has had a trial before a judge without a jury (a bench trial), and, dissatisfied with the result of the bench trial, has sought a de novo trial before a jury. The petitioners, whom we shall call the defendants, argue that the double jeopardy clause of the Fifth Amendment to the Constitution of the United States, as construed in *Burks* v. *United States*, *supra*, requires that the charges against each be dis-

[1] Robert McDonald.

missed following his bench trial because the evidence at the bench trial was insufficient to warrant the convictions.

Under the statutory provisions concerning the trial of cases in the Municipal Court of the City of Boston (Municipal Court), each defendant has the right to a jury trial in the first instance, but the defendants in this case elected instead to have a bench trial, preserving their right to have a jury trial if they were dissatisfied with the result of the bench trial. See G. L. c. 218, § 26A, which is set forth in the margin.[2] The defendants argued to the judge at their joint bench trial in the Municipal Court that the evidence did not warrant their convictions. The judge, however, found them guilty, and the defendants exercised their statutory right to appeal for a trial by a jury of six. Before the jury trial commenced, however, the defendants moved in the Municipal Court's jury trial session to have the charges against them dismissed because the evidence at the bench trial was inadequate to justify their convictions. When this motion was denied, the defendants filed a petition in the single justice session of this court seeking relief under G. L. c. 211, § 3. The single justice stayed the trial of these cases in the jury session of the Municipal Court, and, accepting the defendants' claim that the evidence at the bench trial did not warrant their convictions, reserved and reported two questions to the full bench, which are set forth in the margin.[3] The first of these questions inquires whether a

[2] General Laws c. 218, § 26A, inserted by St. 1978, c. 478, § 188, reads as follows: "Trial of criminal offenses in the Boston municipal court department and in the divisions of the district court department shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to section twenty-seven A. Such waiver shall not be received unless the defendant is represented by counsel or has filed a written waiver of counsel. Such trials by jury in the first instance shall be in those jury sessions designated by said section twenty-seven A for the hearing of such appeals. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance."

[3] "1. Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, requested by him with-

defendant would be denied his right not to be placed in double jeopardy if he were required to go through a jury trial, when the evidence at the bench trial was inadequate to support his conviction. The second question concerns the procedural issue whether, assuming the existence of a double jeopardy claim, a jury-trial judge could or should reconsider the question of the sufficiency of the evidence which a bench-trial judge had decided adversely to a defendant.

The issues are important to the effective operation of the two-tier trial system in effect in the District and Municipal Courts of the Commonwealth. The present two-tier system was adopted, effective January 1, 1979, as part of the reorganization of the Commonwealth's judicial system pursuant to Chapter 478 of the Acts of 1978, commonly known as the Court Reorganization Act. In order to achieve a prompt and efficient disposition of the great number of criminal complaints filed each year in the District and Municipal Courts of the Commonwealth, involving relatively minor crimes, the concept of a bench trial was retained from the Commonwealth's earlier two-tier procedure. However, the Court Reorganization Act introduced a procedure that gave a defendant the right to a jury trial without the necessity of a prior bench trial.[4] As we have noted, a criminal defend-

out waiving his rights, when the evidence at the bench trial was insufficient to warrant a conviction?"

"2. Assuming that a jury trial in such an instance would be a denial of a defendant's right not to be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level, assuming, of course, that the judge at the bench trial has denied an appropriate request for a ruling that the evidence at the bench trial was insufficient?"

[4]This change in the two-tier system was proposed in the December, 1976, Report on the State of the Massachusetts Courts made by the Governor's Select Committee on Judicial Needs, commonly known as the Cox Committee. Recommendation 19 was "A defendant charged with a crime within the jurisdiction of the District Court should be offered an election between an immediate jury trial and an immediate bench trial subject to his right to claim a new trial with a six-person jury in the District Court." *Id.* at 32. Commenting on its recommendation, the Cox Committee said: "In this manner, the Commonwealth can eliminate the

ant now is granted the choice of a jury trial in the first instance or a bench trial followed, if he so requests, by a de novo trial before a jury (or another judge, if the defendant waives his jury right).[5]

The circumstances of the defendants' trial are not important to the resolution of the questions of law reported to the court. The single justice did not report the issue whether the evidence warranted the defendants' convictions.[6] We treat the case as presenting squarely the question whether double jeopardy principles bar the retrial of a defendant who voluntarily chose to have a bench trial when the evidence at the bench trial was inadequate to warrant a conviction. We conclude that the defendants' voluntary choice of a bench trial and subsequent choice of a trial de novo create a situation in which double jeopardy is not implicated. Thus, the defendants' constitutional challenge to the two-tier trial system, which provides a trial de novo as the sole means of obtaining relief from the unsatisfactory result in their bench trial, is without merit.

The defendants argue that they should not be required to undergo a second trial in order to have their convictions reviewed, because the evidence at their first trial was insuf-

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pitfalls and frustration of the present form of trial de novo and still retain an arrangement which disposes of minor criminal cases fairly yet with minimum cost." *Id.* at 33.

[5]The apparent preference of defendants for an initial bench trial, rather than an immediate jury trial, is demonstrated by data for the six months of operation of the Municipal Court's jury session under the new two-tier system. From January 1, 1979, through June 30, 1979, 1751 complaints were received in that session in which only 158, or about 9%, were complaints tried before a jury in the first instance. [1979] Annual Report, The Office of the Chief Administrative Justice of the Trial Court 35 & 37. We note that thousands of complaints were finally disposed of by convictions at bench trials because the affected defendants did not seek a jury trial. *Id.* at 36.

[6]The single justice did not sit as a reviewing court in determining the sufficiency of the evidence. Thus, any conclusion reached by the single justice on this issue was made for the purpose of reporting clearly framed questions to the full bench and is not an adjudication of the rights of the parties in this case.

ficient to warrant a conviction. They claim that a trial de novo would put them twice in jeopardy for the same crime, in contravention of the Fifth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment.[7] *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969). The defendants rely on *Burks* v. *United States*, 437 U.S. 1 (1978), to support their double jeopardy claim.[8] In that case, the Sixth Circuit Court of Appeals had reversed Burk's conviction because the evidence did not warrant a guilty finding and had remanded the case for consideration whether the circumstances warranted a new trial. *United States* v. *Burks*, 547 F.2d 968, 970 (6th Cir. 1976). The Supreme Court held, however, that it would be improper to retry Burks. The Court stated that a judgment of acquittal was required notwithstanding the fact that Burks had requested a new trial. 437 U.S. at 17-18.

The *Burks* case involved different circumstances from those before us because it dealt with an appellate determination that the evidence at trial did not warrant a conviction and a further determination that the double jeopardy clause barred a retrial in those circumstances. Burks was tried in a judicial system that provided for appellate review. No reviewing court has ruled on the sufficiency of the evidence at the bench trial in the present case. Under the two-tier system as it is designed to operate, no court would ever consider this issue. Thus, *Burks* v. *United States* is not applicable. The Court's holding in the *Burks* case was not that "the Double Jeopardy Clause precludes a second trial

[7] If the defendants have a valid double jeopardy claim, it properly should be dealt with in some forum before any second trial. *Costarelli* v. *Commonwealth*, 374 Mass. 677, 680 (1978) (Mass. Adv. Sh. [1978] 734, 737). Immediate relief would be appropriate because, in such a case, the second trial itself would offend the constitutional guarantee. *Id. Abney* v. *United States*, 431 U.S. 651, 660-661 (1977) ("It is a guarantee against being twice put to *trial* for the same offense").

[8] On the same day as the *Burks* decision, the Supreme Court held in *Greene* v. *Massey*, 437 U.S. 19, 24 (1978), that the *Burks* principle was applicable to the States through the Fourteenth Amendment.

once the reviewing court has found the evidence legally insufficient." 437 U.S. at 18 (emphasis supplied).

The Court in the *Burks* case did not consider the question involved in the case before us, namely, whether under double jeopardy principles a defendant convicted on inadequate evidence at a bench trial has a right to a reconsideration of that ruling prior to a trial de novo. The defendants seek to extend the holding in *Burks* v. *United States, supra*, by arguing that that case requires the Commonwealth to provide a procedure by which the defendants can have another judge pass on the sufficiency of the evidence presented at his bench trial.

The defendants are correct in stating that, if they were to obtain a judgment of acquittal due to the insufficiency of evidence presented at their trial, they could not be retried. Double jeopardy protection under the Federal Constitution is afforded to criminal defendants regardless of whether such acquittal occurs at a bench trial, *Kepner* v. *United States*, 195 U.S. 100, 133 (1904), at a jury trial, *United States* v. *Ball*, 163 U.S. 662, 671 (1896), or on appeal, *Burks* v. *United States, supra*. Massachusetts heeds this constitutional mandate.[9] *Ludwig* v. *Massachusetts*, 427 U.S. 618, 631 (1976). But double jeopardy protection is not applicable to a defendant who is convicted and seeks reversal of

[9]The *Burks* opinion introduced no new concept in the disposition of criminal appeals in this Commonwealth. At least in recent times, an appellate determination that the evidence did not warrant a conviction has resulted in an order for the dismissal of the charges and not in a new trial. See *Commonwealth* v. *Delgado*, 367 Mass. 432, 439 (1975); *Commonwealth* v. *Silva*, 366 Mass. 402, 410-411 (1974) (If motion to suppress had been allowed, as it should have been, a directed verdict would have been required. Judgment of not guilty ordered). After the *Burks* decision, we ordered the entry of a judgment of not guilty, citing the *Burks* case, where the trial judge erroneously failed to strike the testimony of a witness and, when struck, the remaining evidence did not warrant guilty findings. *Commonwealth* v. *Funches*, Mass. , (1979) (Mass. Adv. Sh. [1979] 2559, 2572). It was clear in the *Funches* case that the Commonwealth could not cure the insufficiency in the proof. See further discussion of the *Silva* and *Funches* cases in *A Juvenile* v. *Commonwealth*, *post* 1939 n.5.

such conviction by resort to a second-tier trial. The distinction between a convicted defendant and an acquitted defendant in terms of double jeopardy protection was established in *United States* v. *Ball, supra* at 671-672. The validity of this distinction was reconfirmed in *United States* v. *Scott*, 437 U.S. 82, 88-89 (1978),[10] a case decided the same day as *Burks* v. *United States, supra.*

The defendants' argument that the Commonwealth has no legitimate state interest in retrying them overlooks the fact that the Commonwealth did not seek to retry them. The defendants were convicted of the crime of possession of burglarious instruments with the intent to commit larceny. The Commonwealth was content with that disposition. Although the defendants argue that the findings were erroneous, the convictions stood until the defendants requested a trial de novo, which was the only avenue of relief available to them.[11] The Commonwealth did not force the defendants to submit to a second trial. It simply did not provide the defendants a right of appeal or other review from their bench trial. None is constitutionally required. *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956).

A defendant's choice to have a bench trial in the first instance, without any prospect of review of errors occurring in the course of that trial, means that a considerable variety

[10] In the *Scott* case, the defendant was successful in obtaining a dismissal of an indictment because of preindictment delay. The Supreme Court, by a five-to-four vote, held that the government could appeal the dismissal because, if the appeal were successful, the defendant properly could be tried on the indictment without violating the defendant's double jeopardy rights.

[11] The situation here is analogous to the situation in *United States* v. *Ball*, 163 U.S. 662 (1896), where the Court held that the defendants' convictions were based on a fatally defective indictment. The Court held that, although the convictions below would not stand on appeal, "yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of *habeas corpus*." *Id.* at 669-670.

of errors might occur from which he could not obtain any relief. Many of these errors are of a type that could have a considerable effect on the result of the trial. The judge might misapply the law or improperly admit or exclude evidence, to the defendant's disadvantage (or advantage). There might be prosecutorial misconduct, or defense counsel's performance might be inadequate in a constitutional sense. However, errors of this nature in the trial of a case, even when they involve a misapplication of constitutional principles, have never been regarded as presenting a double jeopardy issue, that is, barring a second trial on double jeopardy grounds. "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Burks* v. *United States*, 437 U.S. at 15. And yet, an accused runs the risk of such errors by choosing to have an initial bench trial. We have never indicated that in making such an election the defendant must have knowingly considered and voluntarily waived all the potential errors of constitutional dimension.[12] But see *Ciummei* v. *Commonwealth*, Mass. (1979)[a] (explicit waiver of constitutional right of trial by jury required).

The two-tier court system has already withstood constitutional challenge in the United States Supreme Court. *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976). *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Some form of two-tier system is in effect in approximately one-half of the States. *Colten* v. *Kentucky*, *supra* at 112 n.4. It is difficult to conceive that the Supreme Court intended in its *Burks* decision to hold, by implication, that such a widely adopted system for dealing

[12] The United States Supreme Court has noted that "the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses." *Colten* v. *Kentucky*, 407 U.S. 104, 117 (1972), quoting from *Colten* v. *Commonwealth*, 467 S.W.2d 374, 379 (Ky. 1971).

[a] Mass. Adv. Sh. (1979) 1838.

with less serious crimes is unconstitutional. See *Greene* v. *Massey*, 437 U.S. 19, 27 (1978) (Rehnquist, J., concurring).

The present Massachusetts two-tier system is indistinguishable from that of the Kentucky court system which was challenged on double jeopardy grounds in *Colten* v. *Kentucky*, *supra*, except that to avoid a trial at the first level of the Kentucky system, a defendant had to plead guilty in the inferior court and then request a trial "de novo." *Id.* at 112. A defendant tried in the District and Municipal Courts of Massachusetts may simply obtain a jury trial in the first instance without the stigma of a guilty plea on his record. But neither the Kentucky court system examined in *Colten* v. *Kentucky* nor the present Massachusetts two-tier system imposes two trials on criminal defendants. Thus, no double jeopardy problem is presented. *Colten* v. *Kentucky*, *supra* at 119-120.

The defendants in the present case elected to follow the procedure by which they obtained a bench trial, preserving their right to seek a jury trial if they were dissatisfied with the results of the bench trial. They could have obtained a jury trial in the first instance with a right of appellate review, and no question of double jeopardy would have arisen at the trial level.

The procedure by which a defendant elects a trial by a judge without a jury in the first instance is not casual. Section 26A of G. L. c. 218, inserted by St. 1978, c. 478, § 188, carefully defines the defendant's right to assure that the defendant makes an informed choice. Trials "shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to [§ 27A]." *Id.* No such waiver may be received "unless the defendant is represented by counsel or has filed a written waiver of counsel." *Id.*[13]

[13] Rule 12(A) of the Initial Rules of Criminal Procedure for the District Courts, effective on January 14, 1980, and not applicable to these defend-

A defendant obtains certain distinct advantages in having a bench trial followed by a jury trial, if he wishes. A bench trial serves as a means of discovery and recordation of the prosecution's testimony. Indeed, the judge may find the defendant not guilty. That would end the matter. A bench trial takes less time than a jury trial, offering the defendant a less expensive and less time consuming process. And, if the defendant does not like the result, he may obtain a second chance before a jury or, if he waives a jury, before a second judge, unfettered by the adverse decision previously made. The *Burks* opinion does not alter the statement in *Ludwig* v. *Massachusetts*, 427 U.S. 618, 632 (1976), that "[n]othing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal."

We acknowledge that "where the Double Jeopardy Clause is applicable, its sweep is absolute." *Burks* v. *United States*, 437 U.S. at 11 n.6. There are no equities to be balanced when the clause applies. We think that no double jeopardy is involved, however, when a criminal defendant voluntarily elects to accept the consequences of a procedure such as the optional two-tier system now in effect in the Commonwealth. We concur with the conclusion of the United States Supreme Court "that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 99 (1978).

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ants because they were arraigned in the Municipal Court of the City of Boston (and before January 14, 1980), provides in part:

> "The oral notice of right to first-instance jury trial shall include a statement to the defendant that if he or she waives this right he or she will receive a trial before a judge and if not satisfied with the results of that trial will be able to appeal for a new trial before a jury."

In light of this opinion, consideration might be given to enlarging the consent form so that the defendant acknowledges that his only avenue of relief from any error in the bench trial is a trial de novo.

In effect, allowing a defendant to have a trial de novo, like requiring "a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction[,] is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *Id.* at 91.

We have discussed the double jeopardy issue in terms of the requirements of the Constitution of the United States. No separate argument has been made under the law of the Commonwealth, including the Massachusetts Constitution. The reported question was not limited to the Federal constitutional issue nor expressed solely in terms of constitutional rights. Although this court has never explicitly stated that our Declaration of Rights includes a double jeopardy guarantee (see *Commonwealth* v. *Cepulonis*, 374 Mass. 487, 491-492 [1978][b]), protection against double jeopardy in this Commonwealth has long been part of the common law. See *Gallinaro* v. *Commonwealth*, 362 Mass. 728, 736-737 (1973).

As a matter of common law, we have never held that double jeopardy principles are involved when a criminal defendant, who may have been erroneously convicted at a bench trial, is afforded no appellate or other review of the alleged error but is allowed to seek relief solely by the means of a new trial completely divorced from the record of the prior trial. See *Mann* v. *Commonwealth*, 359 Mass. 661, 664 (1971). The claim of appeal for a second trial has been treated as simply vacating the judgment of the court at the bench trial. See *Enbinder* v. *Commonwealth*, 368 Mass. 214, 217, cert. denied, 423 U.S. 1024 (1975), and cases cited. For the same reasons stated in our discussion on the Constitution of the United States, the circumstances of this case do not offend any provision in the Constitution of the Commonwealth extending jeopardy protection.

We come then to the question, which is rendered largely academic by what we have already decided, namely wheth-

[b] Mass. Adv. Sh. (1978) 477, 482.

er the jury-trial judge could pass on the defendants' motion to dismiss on grounds of double jeopardy. We conclude that the jury trial session is the appropriate forum for consideration of double jeopardy claim asserted after a bench trial. If there is a valid double jeopardy claim, it should be dealt with before, rather than after, the second trial. See note 7 *supra*.

In *Whitmarsh* v. *Commonwealth*, 366 Mass. 212, 216 (1974), appeal dismissed, 421 U.S. 959 (1975), we denied relief under G. L. c. 211, § 3, noting the availability of relief for a double jeopardy claim by means of a motion to dismiss filed in the Superior Court after a District Court bench trial. That opinion considered the procedure for raising double jeopardy issues under the former two-tier system,[14] but the result is no different under the current two-tier system. Rule 13 (c) (2) of the Massachusetts Rules of Criminal Procedure (Mass. [1979]) provides that "[a] defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion." Consequently, the defendants' motion to dismiss properly should have been considered on the merits in the jury trial session. See *A Juvenile* v. *Commonwealth*, Mass. , - (1980);[c] *Connaughton* v. *District Court of Chelsea*, 371 Mass. 301 (1976).

We answer the first reported question in the negative. A defendant is not placed in double jeopardy nerely because his only avenue of relief from a conviction based on insufficient evidence at a voluntarily sought bench trial is a trial de novo. As to the second reported question, the jury-trial judge would have no occasion to consider the sufficiency of the evidence at the bench trial. Because there would be no valid double jeopardy claim, even if the evidence were insufficient to warrant the conviction, the jury-trial judge's

[14] See *Gibson*, *post*, where we discuss the jurisdiction of the Superior Court to consider such a motion under the former two-tier system.

[c] Mass. Adv. Sh. (1980) 1131, 1136-1137.

only option would be to deny such a motion. The case is remanded to the county court for the entry of judgment.

So ordered.

LIACOS, J. (concurring in part and dissenting in part, with whom Abrams, J., joins). Today the court addresses the constitutionality of an aspect of the optional two-tier system of criminal trials described in part in G. L. c. 218, § 26A, inserted by St. 1978, c. 478, § 188. Under this system, a defendant who chooses a bench trial and is convicted on insufficient evidence can be retried de novo to a jury, but he has no other avenue of relief. The majority conclude that this practice does not offend the double jeopardy clause of the Federal Constitution. I respectfully disagree.

The double jeopardy clause creates a constitutional policy against multiple trials of a criminal defendant. See *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). If the prosecution received "one fair opportunity to offer whatever proof it could assemble," but the proof was insufficient, retrial of the defendant would frustrate the purpose of the double jeopardy clause. *Burks* v. *United States*, 437 U.S. 1, 16 (1978). See *Greene* v. *Massey*, 437 U.S. 19 (1978).[1]

The majority declare that "double jeopardy protection is not applicable to a defendant who is convicted and seeks reversal of such conviction by resort to a second-tier trial."

[1] Our previous two-tier system survived a general double jeopardy challenge. *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976). A system somewhat similar to our present one withstood a general challenge in *Colten* v. *Kentucky*, 407 U.S. 104 (1972). However, neither decision addressed the situation in which evidence at the first trial was insufficient. See *Gibson* v. *Commonwealth*, *post* (1980) (Mass. Adv. Sh. [1980] 1933). Both *Ludwig* and *Colten* were decided, moreover, prior to *Burks*, in which the Court first drew a clear distinction between failure of proof and mere trial error, thus overruling a number of earlier cases dealing with double jeopardy claims.

Supra at .[2] *Burks*, however, focused on the nature of the error committed at the first trial, not on acquittal or conviction. Thus, if the error is mere "trial error," which "implies nothing with respect to the guilt or innocence of the defendant," the defendant may be retried. *Burks*, *supra* at 15. If, on the other hand, the government failed to prove its case, retrial is impermissible. *Id.* at 16. The evil at stake is that a defendant against whom the prosecution has not been able to muster even a prima facie case must endure a second trial.

The majority impose a precondition for attachment of the defendants' double jeopardy rights; an appellate determination that the evidence was insufficient to convict him.[3] In so doing, the majority disregard the substantive mandate of *Burks* and fix upon a formal nicety wholly unrelated to the purposes of the double jeopardy clause. If a defendant is convicted on insufficient evidence, he cannot be retried, and it should matter not at all whether an appellate court has confirmed the insufficiency.

The double joepardy clause requires the prosecution to prove its case in one trial. If the prosecution's evidence was so weak that no reasonable trier of fact could conclude that the defendants were guilty beyond a reasonable doubt, this principle applies with special force. The majority choose to

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[2] Mass. Adv. Sh. (1980) 1919.

[3] The majority cite *United States* v. *Scott*, 437 U.S. 82, 88-89 (1978), in support of their distinction. *Supra* at (Mass. Adv. Sh. [1980] at 1921). *Scott* involved an appeal by the government. But, in summary, that discussion merely states: "The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, . . . poses no bar to further prosecution on the same charge." *Id.* at 90-91. For a defendant convicted at a first trial, the *Scott* opinion does not abrogate the distinction between evidentiary insufficiency and trial error. Indeed, the careful distinctions drawn in *Scott* as to dismissal of an indictment for reasons other than failure of proof support my view. "In the present case, the District Court's dismissal of the first count of the indictment [after the close of all of the evidence] was based upon a claim of preindictment delay and not on the court's conclusion that the Government had not produced sufficient evidence to establish the guilt of the defendant." *Id.* at 95.

ignore this logic. They would put the defendants here through the "embarrassment, expense and ordeal" of a second trial, and would consign them for a second time to "a continuing state of anxiety and insecurity." *Green* v. *United States, supra* at 187. They refuse to recognize that the double jeopardy clause safeguards against just such mistreatment at the hands of the criminal justice system. After today, the enforceability of the *Burks* right will depend largely upon the sufferance of the Legislature. If the Legislature chooses to provide a criminal defendant with no avenue of relief other than a second trial, the defendant's constitutional right must languish among shadows.

The majority opinion states: "We think that no double jeopardy is involved . . . when a criminal defendant voluntarily elects to accept the consequences of a procedure such as the optional two-tier system now in effect in the Commonwealth." *Supra* at .[b] The majority point out that the defendants, not the Commonwealth, sought a trial de novo and that the Commonwealth simply provided the defendants with no other right to review of the bench trial.

The majority seem to treat a defendant's "voluntary" choice of a bench trial and subsequent "choice" of a trial de novo as a waiver of his double jeopardy rights.[3] But waiver of rights under the double jeopardy clause, like waiver of other constitutional rights, must be knowing and voluntary. *Green* v. *United States, supra* at 191. Even if the Commonwealth is not obliged to furnish a defendant with an avenue of appeal, a defendant choosing the bench trial should

[b] Mass. Adv. Sh. (1980) at 1924.

[3] "We conclude that the defendants' voluntary choice of a bench trial and subsequent choice of a trial de novo create a situation in which double jeopardy is not implicated." *Supra* at (Mass. Adv. Sh. [1980] at 1918). "[D]ouble jeopardy protection is not applicable to a defendant who is convicted and seeks reversal of such conviction by resort to a second-tier trial." *Supra* at (Mass. Adv. Sh. [1980] at 1920-1921). Such language disregards the clear language of *Burks* to the contrary: "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy." *Burks* v. *United States*, 437 U.S. 1, 17 (1978).

understand what he is giving up. Yet the majority seem oblivious to this principle. They make no provision that a defendant understand he is giving up his right not to be tried a second time after being convicted on insufficient evidence.[4] However, if a defendant's choice of a bench trial was not made intelligently, then he did not choose to accept the consequences of his choice. He did not choose to make a second trial his only avenue of relief from a conviction in the first trial. If a defendant's initial choice was not intelligent, it is pointless to say that the Commonwealth does not force him to endure a second trial.

The majority do not suggest that the present two-tier system makes provision for explicit waiver of the right to avoid a second trial after a bench trial conviction on insufficient evidence. Nor does such a waiver appear affirmatively in the report or the record. See *Ciummei* v. *Commonwealth*, Mass. (1979).[5] Therefore, I would answer the first reported question in the affirmative.

On the second question, as if to carry their sophistical exercise a step further, the majority assert that the defendants, in a case such as this one, can raise their double jeopardy claims before the jury-trial judge. But what can be the purpose of this review? According to the majority, the defendants have no double jeopardy claim. Thus, for defendants such as Michael Lydon and Robert McDonald, the procedure before the jury-trial judge can only be charade in which the defendants' motion to dismiss inevitably will be denied. Perhaps the real purpose of this review is to give the jury-trial judge a chance to rule on the sufficiency of the evidence and thus to nullify the inexplicable result reached today.[6]

[4]The majority point out that a defendant who chooses a bench trial may obtain tactical and other advantages. *Supra* at (Mass. Adv. Sh. [1980] at 1923). However, a defendant's choice is not meaningful, in constitutional terms, unless he also understands that he is giving up his constitutional right. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

[5]Mass. Adv. Sh. (1979) 1838.

[6]The majority do not state that this review is available for all double jeopardy claims arising from the bench trial, or for claims unlike Lydon's and McDonald's.

Because I would answer the first reported question in the affirmative, I concur with the majority's answer to the second question. The jury trial session is the proper forum for a defendant to raise a double jeopardy claim arising at his bench trial.